Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

Terry F. Zdun, Carol J. Zdun, and
Terry F. Zdun, D.D.S, President, Dentex P.C,

Petitioners

v.

Paula J. Henderson, Revenue Agent, et al.

Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a Petition To Quash an appropriate pleading from within which to challenge the jurisdiction of the maker of a summons to issue it and/or the jurisdiction of a court to enforce it?

(a) Where in their Petition To Quash filed in the below District Court, Petitioners claimed that Respondent(s): lacked a duty to issue a summons; lacked *in personam* jurisdiction over them for the purpose of issuing a summons, and; created Constitutional torts when they issuing the summonses complained of, did Petitioners act properly in bringing said complaint against Respondent(s) personally in her(their) private capacity?

(b) Under said conditions, did the below District Court err where it determined that Petitioners had no basis for making a *Bivens* type claim?

2. Under the circumstances described herein as being applicable, did Respondent(s) properly have jurisdiction over Petitioners for the purpose of issuing a third-party summons?

(a) Did the below District Court have a jurisdiction to enforce any said summons where Petitioners had raised the issues of both the Respondent(s) jurisdiction to issue a summons and the Court's jurisdiction to enforce same where Respondent(s) said jurisdiction was alleged to be lacking?

(b) Did the below District Court deprive Petitioners of due process by failing to find either Respondent(s) or its own jurisdiction where the Petition To Quash filed in that Court below contained challenges to each?

3. Did Respondent(s) violate the right of Petitioners who are people, protected by the Fourth Amendment, to not have a warrant issue, but upon probable cause, where as regards the class of taxpayers all Petitioners of this matter are in, which class renders returns not of objects subject to tax, Congress via Revised Statutes § 3173 ("RS 3173"), as subsequently reenacted, defined only the refusal or neglect to timely comply with a notice to render a return to be a legitimate purpose for a summons to issue, Respondent(s) did not serve any said notice and thus had no statutory duty to summon, and therefore acted extra-statutorily and/or outside the *Powell* environment when they issued summonses to third parties seeking to search Petitioners' papers and effects.

(a) As regards all Petitioners, is the absence of said condition of refusal or neglect jurisdictionally controlling over Respondent's(s') ability to issue a summons and must a summons issued absent the existence of said condition therefore be quashed for being null and void for lack of a proper summons jurisdiction over Petitioners?

4. Did Respondent(s) violate any Petitioner's right protected by the Fifth Amendment, to be not deprived of liberty without due process of law, when named Respondent issued the complained of summonses and it appears that RS § 3173 as reenacted left Petitioners at liberty to render valid returns which absent legitimate purpose or good cause having been shown, were acceptable at face value?

5. Did Respondent(s) apply or attempt to apply a capitation or other direct tax in violation of the Constitutional requirement for apportionment of same found at Article 1, Section 9, when Respondent(s) perform(s) any one, or any combination, of the following acts:

(a) Where this is a "case of a tax shown on a return by a taxpayer," failing to act in a manner comporting with the requirement to assess only the amount shown on any Petitioner's return, as is required by 26 CFR 301.6203-1.

(b) Issuing any third-party summons while failing to comply with the requirement to make same to be "directly connected" to "the purpose of determining or collecting a particular tax liability," as is required by 26 CFR 301.7602-2(c)(3)(i)(A).

(c) Issuing any third-party summons in regards to a taxpayer which renders returns not of objects subject to tax when the sole condition that provides jurisdiction to summon a taxpayer of said class does not exist, where said condition is the refusal or neglect to timely comply with a notice to render a return, per Revised Statutes § 3173, which as reenacted, remains law today and which underlies the summons power currently reflected in 26 USC 7602

6. Was the First Amendment right of Petitioners who are people, to petition the government for a redress of grievances, violated when the below District Court rejected their petition for a redress of grievances on the basis that it had not been brought against the government, where said petition was brought against government agents alleged to be acting without a proper jurisdiction and unconstitutionally?

7. As regards this matter, did the Petitioners who are people, have a property right protected by the First Amendment, in their speech found in a tax return, which cannot be overcome by a mere *prima facie* claim or showing that an act was done in good faith?

8. Did the below District Court violate its requirement to make findings of fact and conclusions of law as is required by Rule 52(a) of the Federal Rules of Civil Procedure ("FRCvP 52(a)") and/or fail to make a finding on each and every issue presented as is required by FRCvP 54(b) and thereby or otherwise deprive Petitioners of justice and/or due process?

9. Did any action or omission of the District Court make it impossible for Petitioners to have a valid appeal and/or prevent the 9th Circuit Appellate Court from having jurisdiction?

LIST OF PARTIES

It is believed that, other than currently unnamed Respondents existing as 10 Does, who are referenced by the words "et al," the names of those who are properly parties to this proceeding appear in the caption of the case.

The United States, over Petitioners' objections, was allowed to inserted itself into the below actions. It was not sued and for reasons described herein, is believed to be not properly a party to this matter. Its presence as a party to this proceeding is OBJECTED TO.

CORPORATE STATEMENT

Petitioner Dentex P.C. is an alter ego of Petitioner Terry F. Zdun. It has no parent corporation and no publicly held company owns 10% or more of its stock.

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In the United States District Court for the District of Oregon, Civil No. 06-6072-TC

ORDER Dated 7 November 2006 (Doc 11) 43
Plaintiff allowed 30 days to show cause why defendant's Motion to Dismiss should not be allowed.

Order Filed 18 December 2006 (Doc 14) 45
Striking findings and recommendations based on plaintiff's response.

FINDINGS AND RECOMMENDATION
Dated 29 January 2007 (Doc 17) 47
Found that U.S. is proper party-defendant and Plaintiffs' arguments are frivolous. Action should be dismissed with prejudice.

ORDER: Filed 8 February 2007 (Doc 19) 50
Granting Plaintiffs' Motion for Extension of Time to file objections.

ORDER Dated 19 March 2007 (Doc 24) 52
Plaintiffs' Motion for reconsideration denied. Plaintiffs' objections deemed timely filed and referred to District judge.

Order Filed 20 March 2007 (Doc 25) 53
Referring Findings & Recommendation: Motion to Dismiss should be granted to Judge Ann Aiken for review.

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In the United States District Court for the District of Oregon, Civil No. 06-6072-TC

O R D E R Dated 21 March 2007 (Doc 26) 55
No objections have been timely filed. Magistrate's Findings and Recommendation are adopted without de novo review.

JUDGMENT Filed 21 March 2007 (Doc 27) 56
This action is dismissed.

ORDER Dated 26 June 2007 (Doc 39) 57
Plaintiffs' Motion to Alter or Amend Judgment [29] is granted to the extend I consider their objections. Here, the sworn declaration satisfies burden of showing that summons was issued for proper purpose. IRS need not make an assessment or show that a tax liability exists before issuing a summons. Henderson is not the proper party-defendant. Plaintiff (sic) fails to establish subject matter jurisdiction or state a claim for which relief may be granted. Findings and Recommendation (doc. 17) is adopted, Motion to Dismiss is granted, plaintiff's (sic) claims are dismissed.

JUDGMENT Dated 27 June 2007 (Doc 40) 60
This action is dismissed.

ORDER Filed 2 July 2007 (Doc 42) 61
Defendant's Motion to Strike [35] denied as moot.

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In the United States District Court for the District of Oregon, Civil No. 06-6072-TC

ORDER Filed 23 July 2007 (Doc 47) 63
Denying Plaintiff's Motion to Alter or Amend Judgment Dated 26 June 2007 [44].

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, No. 07-35465

MEMORANDUM Filed 15 January 2009 65
We review for clear error. The district court properly dismissed the action based on the prima facie showing that the summonses were issued in good faith and correctly determined that IRS agent conducting tax assessments and collections is not a proper defendant in a suit taking (sic) against him in his official capacity.

Appeal by corporate plaintiff is dismissed because a corporation may not appear pro se.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Terry F. Zdun, Carol J. Zdun, and Terry F. Zdun, D.D.S, President of Dentex P.C respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding.

OPINIONS BELOW

The opinions of the below Courts, the United States District Court for Oregon and the United States Court of Appeals for the Ninth Circuit, are reprinted in the Appendix.

JURISDICTION

The judgment of the below Court of Appeals was filed on 15 January 2009. This petition was timely filed within 90 days of that date and is timely filed again as corrected and amended within 60 days after having received a notice of deficiency from the clerk of this court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, and FEDERAL RULES OF CIVIL PROCEDURE

Due to length, the text of the stock of materials named immediately following, is set out in the appendix.

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STATEMENT OF THE CASE

1. Basis for first instance jurisdiction.

The below District Court had jurisdiction "under 28 U.S.C. 1331 (civil action arising under the Constitution and laws of the United States) and/or 28 U.S.C. 1340 (civil action arising out of Act of Congress providing for internal revenue) for all issues addressed by this pleading."

2. Statement of facts

(a) Actual facts.

Petitioners are not required to deliver returns of objects subject to tax.

As regards this matter and prior to any time required by notice, Petitioners rendered valid returns.

Prior to the beginning of the below action which directly leads to this Petition, Petitioners became aware of the existence of Revised Statutes § 3173, its application as current law from which relevant and applicable part of § 7602 in Title 26 of the United States Code is derived[2] and provided notice to the Respondent(s), that as regards Petitioners, who had rendered returns not of objects subject to tax, and based on said current law, Respondent(s) lacked jurisdiction to issue third-party summonses in regards to them and that if Respondent(s) did so, such action would deprive them of Constitutionally protected rights.

Petitioners' presented applicable law and regulations as evidence verifying said facts. Respondent(s) never demonstrated any mistake of fact and contumaciously refused to follow applicable regulations.

Complained of summonses were sent to third parties.

---

[2] Petitioners have personally confirmed the accuracy of said information and acknowledge Peter Hendrickson (www.losthorizons.com) for his work in unearthing it.

No summons of this matter claims to have been issued under the § 7602 summons authority. Any said summons only states on its face that it was "issued under the authority of the IRC."

A formal Demand for Administrative Remedy regarding the issues of this matter herein described, was filed with Respondent(s) concurrently with the commencement of the below action in District Court. Both the Respondent(s) and the District Court ignored said demand.

Petitioners' Petition To Quash filed in the below District Court focused on two main aspects which are:

1) as regards the class of taxpayers Petitioners are in, the limitation on the jurisdiction Respondent(s) has(have) to summon;

> The IRS "is a creature not of the Constitution but of legislation and is thus peculiarly subject to legislative constraints."
>
> *United States v Bisceglia*, 420 U.S. 141

2) the particularization regulations require a third-party summons to meet, and showed that Respondent(s) lacked subject matter jurisdiction for third-party summons purposes where regulations were not followed.

... the summons power can be utilized only when IRS scrutiny of a taxpayer or a group thereof becomes particularized or focused. We agree with the District Court that "[t]here must be some nexus between information sought and a specific investigation of specific individuals before the government can compel third parties, at their own expense, to give information to the Internal Revenue Service." United States v. Humble Oil & Refining Co., 346 F.Supp. 944, 947 (S.D. Tex. 1972). Before a section 7602 summons may issue, the IRS must have traversed the data gathering stage and initiated an investigation."

...

"Section 7602 simply cannot be read to give the IRS an unrestricted license to enlist the aid of citizens in its data gathering projects. A contrary conclusion would eviscerate judicial constraints upon the summons power and raise serious constitutional questions. Moreover, in view of the particular need for judicial surveillance of the summons power when the summons is directed not to a taxpayer, but to a third party, see Bisceglia v. United States, supra at 711; United States v. Harrington, supra, 388 F.2d at 523, quoted approvingly in United States v. Theodore, supra, 479 F.2d at 754; Venn v. United States, 400 F.2d 207, 211-212 (5th Cir. 1968), we feel that our decision accommodates both the legitimate personal interests of the citizenry and the need of the IRS to investigate noncompliance with the tax laws, unencumbered by obtrusive judicial monitoring."

U.S.A v. Humble Oil & Refining Co., 488 F.2d 953 (1974)

Said jurisdiction and failure to follow regulations issues were completely ignored by the below courts.

(b) Facts of Law.

The codified description of the authority to issue any summons which is a subject or object of this matter is found in Title 26 of the United States Code, at § 7602(a) thereof ("26 USC 7602(a)").

The Statutes at Large are the authoritative sources which dispel any confusion about the limits that apply to IRS summonses.

26 USC is not in and of itself the law. It is rather a compilation of essential aspects derived from certain Statutes at large which is designed to be a compact and concise reflection and representation of same. It is *prima facie* evidence of the law found in the statutes it is derived from. The act of compaction which creates the United States Code necessarily and inevitably results in a loss of detail found in the law and source documents it reflects.

1 USC 204(a) explains the nature of the United States Code as it relates to the law, as follows:

> (a) United States Code.—The matter set forth in the edition of **the code of Laws of the United States** current at any time shall, together with the then current supplement, if any, **establish prima facie the laws of the United States**, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: Provided, however, that

> **whenever titles of such Code shall have been enacted into positive law the test thereof shall be legal evidence of the laws therein contained**, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States. 1 USC 204(a)
> (***Unless stated otherwise, bold text in this and all following citations is added emphasis.***)

Title 26 of the United States Code has not been enacted into positive law:

> Of the 50 titles, only 23 have been enacted into positive (statutory) law. These titles are 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 44, 46, and 49. When a title of the code was enacted into positive law, the text of the title became legal evidence of the law. **Titles that have not been enacted into positive law are only prima facie evidence of the law. In that case, the Statutes at Large still govern.**
> United Sates Government Printing Office at http://www.gpoaccess.gov/uscode/about.html

This honorable Supreme Court has confirmed said fundamental judicial doctrine:

> When the words of a statute are unambiguous, the first canon of statutory construction—that Courts must presume that a legislature says in a statute what it means and means in a statute what it says there—is also the last, and judicial inquiry is complete.
>
> *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992)

For said reasons, where Title 26 of the United States Code has not been enacted into positive law, we must necessarily look to the Statutes which underlie 26 USC 7602 in order to find the legal evidence of the law and acquire a proper understanding of how to correctly apply its language.

In pertinent part, 26 USC 7602 is derived from § 3173 of the Revised Statutes of 1873 (RS 3173) as amended in 1919 and reenacted as current law in the Revenue Act of 1926. RS 3173 unambiguously defines two classes of taxpayers as being subject to the summons and examination authority of the Secretary. The first class consists of those who were notified that they must render a return and did do so within the time said notice required. The second class consists of those required to "deliver a monthly or other return of objects subject to tax."

The language of RS 3173 also makes it clear that: as regards members of said second class, those required to deliver a return of objects, a summons can issue without any need to first provide a notice, either on the basis of a return having not been rendered timely or on the basis of examining a return for accuracy; as regards members of the first class, those not required as said, as may be relevant to this matter, a

summons can only issue on the basis of a return having not been rendered within a time provided by notice. As regards said first class, no provision exists in the law which provides for the ability to issue a summons when the only purpose would be to examine records so as to verify the accuracy of a valid return rendered not later than a time provided by notice.

RS 3173 has been reenacted in every major revenue act since Abraham Lincoln was President. It is the law today. It harmonizes the federal taxing power with the Constitutional limits on that power.

Its precursor, § 93 of the Revenue Act of 1862, expressed the same principles even more clearly, unambiguously stating that a sworn return was the final irrefutable word concerning the one who rendered the return, as follows:

> Provided, that any party, in his or her own behalf, or as guardian or trustee, as aforesaid, shall be permitted to declare, under oath or affirmation, the form and manner of which shall be prescribed by the commissioner of Internal Revenue, that he or she was not possessed of an income of six hundred dollars, liable to be assessed according to the provisions of this act or ... has been assessed elsewhere ... and shall thereupon be exempt from an income duty; or, if the list or return of any party shall have been increased by the assistant assessor, in manner as aforesaid, **he or she may be permitted to declare, as aforesaid, the amount of his or her annual income**, or the amount held in trust, as aforesaid, liable to be assessed, as aforesaid, **and the same so**

> **declared shall be received as the sum upon which duties are to be assessed and collected.** Revenue Act of 1862, § 93

Lest this honorable Supreme Court be concerned that the law has in fact, been changed through some action of its many re-codifications, we need look no further than the first compilation of revenue law in 1939 for confirmation that is has not been changed. The language of the 1939 Code is clearer than subsequently produced versions of the same subject matter, as follows:

> SEC. 3615. SUMMONS FROM COLLECTOR TO PRODUCE BOOKS AND GIVE TESTIMONY.
> (a) GENERAL AUTHORITY.—It shall be lawful for the collector, **subject to the provisions of this section** to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof ....

And the "provisions of this section" were:

> (b) ACTS CREATING LIABILITY.—Such summons may be issued—
> (1) REFUSAL OR NEGLECT TO COMPLY WITH NOTICE REQUIRING RETURN.—If any person, **on being notified or required** as provided in section 3611, shall refuse or neglect to render such list or return within the time required, or
> (2) FAILURE TO RENDER RETURN ON TIME.—Whenever any **person who is required to deliver a** monthly or other **return of objects subject to tax** fails to do so at the time required, or
> (3) ERRONEOUS, FALSE, OR FRAUDULENT RETURN.—Whenever any **person who is required to deliver a** monthly or other **return of objects subject to tax** delivers any return which, in the opinion of the collector, is erroneous, false, or fraudulent, or contains any undervaluation or understatement, or
> (4) REFUSAL TO PERMIT EXAMINATION OF BOOKS.—Whenever any **person who is required to deliver a** monthly or other **return of objects subject to tax** refuses to allows any regularly authorized Government officer to examine his books.

The language of the 1939 code maintains the clarity of the original revenue statutes. It tells us exactly who is subject to the examination powers of the Secretary. The Preliminary Materials section of the current IRC indicates that its § 7602 is a re-codification of §§ 3614, 3615(a), (b), and (c), and

3632(a)(1) of the 1939 IRC. The language of § 7602 took its current form in 1954.

This honorable Supreme Court stated that changes in the language of § 7602 did not change its meaning.

> The legislative history of the code supports the conclusion that congress intended to design a system with interrelated criminal and civil elements. Section 7602 derives, without change in meaning, from corresponding and similar provisions in 3614, 3615, and 3654 of the 1939 code. *United States v LaSalle National Bank*, 437 U.S. 298 (1978) referencing H.R. Rep. No. 1337, 83rd Cong., 2nd Sess., A436 (1954); S. Rep. No. 1622, 83rd Cong., 2nd Sess., 617 (1954).
>
> (Note. The reference to § 3654 is out of date with the current derivation table, but that section simply reflected the authority to summons "officers of internal revenue" and does not bear on this matter. The Tax Reform Act of 1982 replaced said section with 26 USC 7602(b) which extends the summons power to investigations of IRS employee conduct.)

Which makes it clear that notwithstanding the loss of clarity which has occurred through changes of language introduced by re-codifications, the current § 7602 has no meaning which is not also found in § 3615 of the 1939 IRC (*supra*).

(c) Administrative Facts

The regulations that must be complied with and followed when issuing any summons which is a subject or object of this matter are found in Title 26 of the Code of Federal Regulations (26 CFR), at several locations stated as follows:

Respondent(s) is(are) restricted by 26 CFR 301.7602-1(a) to only examining that "which may be relevant or material" to an inquiry which is limited to the purpose of "determining ***the*** liability" for any internal revenue tax.

When contacting a third-party in regards to said purpose of "determining ***the*** **liability**," 26 CFR 301.7602-2(b)(3) requires a summons to be "made with respect to the determination of ***the*** **tax liability**."

The word "the" is the English language's definite article, functioning as an adjective. Where it is used before a noun, as where it is emphasized immediately above, it denotes particular or previously specified persons or things (*see* any competent dictionary)

The term "with respect to" is defined at 26 CFR 301.7602-2(c)(3)(i)(A), which makes it clear that having a valid purpose does not in and of itself cause a contact to be "with respect to" the "determination or collection of the tax liability," and that a second qualifying condition of being "directly connected to that purpose" must also concurrently exist.

(d) Policy Facts.

The Revenue Manual (IRM) defines relevant policy as follows:

> IRS policy requires that employees are only allowed access to paper and electronic taxpayer records that are needed by a specific employee to carry-out his/her tax-related duties.
>
> IRM 4.10.1.6.11(1)

(e) Proceedings Below

Before the original case which underlies this Petition began, Petitioners put Respondent(s) on notice of said facts and that: where Petitioners had rendered returns, Respondents lack *in personam* jurisdiction to issue any summons; where particularization required by regulations is not applied, Respondents lack subject matter jurisdiction for third-party summons purposes.

Respondent(s) considered said viewpoint to be frivolous, dismissed out of hand the evidence presented in support of the contentions, and refused to follow said regulations.

In the year 2005 said evidence and supporting argument was presented in Petitions to Quash summonses filed in the United States District Court For The District Of Oregon as case numbers 05-CV-6210-HO, 05-MC-7014-HO, 05-MC-7015-HO, and 05-MC-7016-HO. Said cases were dismissed. Financial constraints and other difficulties prevented their further pursuit.

Respondent(s) issued new summonses after Petitioners again rendered valid returns timely as said, and in 2006 Petitioners filed a new Petition to Quash in the above said District Court, as case number CV-06-06072-TMC.

The case was **NOT** brought against Respondent(s) for any official capacity act or omission. It was brought against Respondent(s) for action or omission occurring while acting in a private personal capacity. 10 Does were also similarly included. This case was brought against Respondent(s) on the basis that they lacked a summons jurisdiction over Petitioners and had perpetrated one or more constitutional torts while not implementing an authorized agency action (extra-procedural and unconstitutional action or omission while not having jurisdiction over any Petitioner for the purpose of a summons).

The claim was made that under the conditions which existed, Respondent(s) lacked any duty to issue a summons. The United States was consequently not served with the case per Federal Rules of Civil Procedure, Rule 4(i)(3), because said rule indicates such service should be made only in regards to "an act made or omission occurring in connection with duties."

The case provided sufficient documentation, per *United States v. Stuckey*, 646 F.2d 1369, 1372, (9th Cir. 1981), cert. denied, 455 U.S. 942 (1982), to constitute the "minimum amount of evidence" required to support a contention that Respondent(s) proceeded absent good faith.

Petitioners claim the language of RS 3173 constitutes unambiguous directions from Congress which circumscribe the § 7602 summons power.[3]

A Magistrate Judge issued factual determinations in said case which did not acknowledge nor comment upon Petitioners' two main issues (lack of jurisdiction[4] and failure to follow regulations) and restructured some of their verbiage into describing as "frivolous," arguments they never made.

Petitioners timely objected to said factual determinations as being neither factually correct nor controverting any claim they'd made. The judge in the case failed to take notice of said objections, reviewed only "legal principles de novo" and dismissed the case. Petitioners filed a Motion to Alter or Amend Judgment and the case was dismissed again. Language of said second dismissal leads Petitioners to believe the judge read nothing except what the Magistrate wrote and did nothing to

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[3] "... [T]he summons authority should be upheld absent express statutory prohibition or substantial countervailing policies," *Euge*, 444 U.S. at 711, 100 S.Ct. at 878 ..., and should not be circumscribed "absent unambiguous directions from Congress," *United States v. Bisceglia*, 420 U.S. 141, 150, 95 S.Ct. 915, 921, 43 L.Ed.2d 88 (9175) ...; *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 105 S.Ct. 725, 729, 83 L.Ed.2d 678 (1985)." *PAA Management, LTD. v. U.S.A.*, 962 F.2d 212

[4] In regards to the summons power, this court said, "It is a limited power, and should be kept within its proper bounds, and, when these are exceeded, a jurisdictional question is presented which is cognizable in the courts."
United States v. Bisceglia, 420 U.S. 141, 151 (1975)

ensure that the summons power was not being used extra legally as the court's required to do.[5]

The District Court did not examine any summons as it is required to do.[6]

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit, which in case number 07-35465, upheld the District Court's determination. Said dismissal and upholding are the subject of this Petition.

Petitioners made claims and arguments in the below courts that when the restricted and limited circumstances as described exist: Respondent(s) lack jurisdiction over Petitioners for any purpose of issuing a summons; a prima facie showing that the summonses were issued in good faith was only good enough for Respondent(s) to be able to present that issue in the court and was not sufficient in and of itself as a basis for dismissing Petitioners' action; for lack of delegation of authority applicable to, and/or lack of any proper summons jurisdiction over Petitioners, Respondent(s) were proceeding only

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[5] "Although the summons power provisions of the Internal Revenue Code are to be liberally construed, a court must be careful to insure that its construction will not result in a use of the power beyond that permitted by law."
U.S.A. v. Humble Oil & Refining Co., 488 F.2d 953

[6] "Once a summons is challenged, it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose and is not meant "to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States v. Powell, supra*, 379 F.2d 749" *United States v. Bisceglia*, 420 U.S. 141, 146 (1975)

under color of law and not actually or genuinely conducting tax assessments and collections and therefore *Bivens* relief is available to them and Respondent(s) personally are proper defendants; where Respondent(s) lack jurisdiction, where the relevant tax law only distinguishes between classes of taxpayers, where justice cannot be obtained or provided except where a natural person appears as or for a corporate one, the courts lack jurisdiction same as Respondent(s) do, no Petitioner can be distinguished from, or separated from another on any basis which the relevant law does not use.

No below court ever addressed any said Petitioner claim or argument.

ARGUMENT

INTRODUCTION

This matter finds similarities and echoes in this court's recently (3 March 2008) decided case No. 06-1509, *Boulware v. United States* (*Boulware*).

In *Boulware*, the petitioner alleged, and this court found, that a conviction of tax evasion should be quashed for failure to be directly connected to a tax deficiency. In this matter Petitioners allege that third-party summonses should be quashed for failure to be directly connected to a particular tax liability.

Both said allegements are based on exactly the same reasoning, which is, because that's the way congress wrote the statutory authority.

In this matter, Respondent(s) summoned a third party while at the same time failing to follow regulations regarding particularization required in a summons to a third party. Where only said failure is considered, it would appear that Respondent(s) operate statutorily, the only issue would be lack of subject matter jurisdiction and the United States would be properly the party to name as Defendant.

As regards this matter however, Respondent(s) said failure occurred when Respondent(s) summoned a third party in regards to Petitioners when the conditions which allow a taxpayer to be a subject or object of a summons are found in an applicable statute and no condition therein described applies to any Petitioner. Respondent(s) therefore lacked *in personam* jurisdiction over Petitioners for the

purpose of issuing a summons and acted extra-statutorily, under color of law. When acting from without the statutory environment, Respondent(s) are required to have probable cause before taking any enforcement act. Where said act of omission is made extra-statutorily, Respondent(s) is(are) properly the party(ies) to name as Defendant(s).

PREFACE

The opinions of the below courts do not do more than express the use of settled legal concepts applicable where 26 USC, § 7602 only authorizes the summoning of information relative to 1) — a particular return and 2) — a particular person. As regards mere sufficiency of the summons documents involved, the claim and argument Petitioners made in the below courts was that, when the third parties of this matter were summoned, regulations require a summons to be made also in regards to and directly connected to a third particularization, which is 3) — a particular tax liability.

The below courts completely ignored said claim and argument Petitioners made and, as regards only said issue Petitioners raised regarding overbroadness of the summonses complained of, did not genuinely settle anything.

The main point of this Petition is however, that where the original Petition to Quash brought in the below District Court, was primarily a complaint regarding Respondent's(s') lack of jurisdiction to issue a summons where, within the limited constraints of a summons sent to, 1) — a third party, and 2) — made in regards to a person not described in a list of persons defined by statute as being summonable, as was described in said original pleading, Respondent's(s') complained of summonses are not statutorily authorized as regards Petitioners.

> Although the power of the IRS to investigate is akin to that of the grand jury in terms of its breadth, (cites deleted), it differs from the grand jury's in terms of its source. The grand jury's authority is inherent, while the Internal Revenue Service's, like that of all administrative agencies, must find support in enabling legislation. (cite deleted). *U.S.A. v. Humble Oil & Refining* Co., 488 F.2d 953, 961, fn. 7

Respondent(s) therefore lacked *in personam* jurisdiction over Petitioners with which they could issue a summons regarding them, and where the below courts' jurisdiction to enforce a summons relies necessarily on Respondent's(s') jurisdiction to issue one, the below courts also acted without necessary subject matter and *in personam* jurisdictions over Petitioners required to enforce a summons.

> Since absent a statutory grant in the first instance, the IRS would possess no more authority to enforce an overbroad summons than one narrowly tailored to further legitimate objectives. *U.S.A. v. Humble Oil & Refining* Co., 488 F.2d 953, 956

GRAVAMEN

No duty exists for Respondent(s) to issue a summons in regards to any Petitioner where no Petitioner is in the class of taxpayers which render returns of objects subject to tax, each rendered valid returns prior to any time required by notice, and no Petitioner is therefore defined by RS 3173 as a person in regards to which the 7602 summons power may apply.

Where no duty exists to issue a summons, Respondent(s) status is extra-statutory, *Powell* does not control the environment,[7] and Respondent(s) must proceed in the same way that any ordinary police officer must and show that a probable cause exists as a basis for issuing a summons to a third party.

Said probable cause cannot consist of less than a showing that a case is more than just a mere "case of tax shown on a return by the taxpayer" as said quoted language is used in 26 CFR 301.6203-1.

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[7] "[A] major premise of *Powell* was that an extra-statutory "probable cause" requirement was unnecessary in view of the "legitimate purpose" requirements already specified in § 7602, 379 U.S. at 56-57." *United States v. Bisceglia*, 429 U.S. 141, 159

As is used in any regulation cited herein, the term: "**the liability**" means the Dollar amount owed as a payment for tax; "**the tax liability**" means the activity or privilege voluntarily entered into from which "the liability" is derived; "**determination or collection of the tax liability**" means assessment or obtainment of money which may be due from participation in a tax liability which has been named or defined.

Said meanings are the correct meanings of said terms.[8]

26 CFR 301.7602-1(a) restricts any Respondent(s) inquiry to the purpose of determining "the liability." A duty to issue a summons does not arise directly and solely from a tax liability, but rather arises more from a liability to be summoned, where per 26 CFR 301.7602-1(a), Respondent(s) can only examine that "which may be relevant or material," to an inquiry, and where 26 CFR 301.6202-1 requires that "the amount of assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown," a liability to be summoned is distinctly and concisely defined as being restricted to those cases which consist of something more than only a "case of tax shown on a return."

If a matter is only a "case of tax shown on a return," 26 CFR 301.6203-1 requires Respondent(s) to collect only the amount shown on a return, and no valid

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[8] As being the only ones which do not make the purpose of an inquiry to be determining if a reason exists for an inquiry.

purpose, and therefore no duty, exists when issuing a summons to a third party.

In order for a "third-party contact" to be legitimately legal, 26 CFR 301.7602-2(c)(3)(i)(A) makes it clear that two requirements must be complied with, which are 1), show that the contact (summons) is "made for the purpose of either determining or collecting a **particular** tax liability" and 2), show that the contact (summons) is "directly connected to that purpose."

Said two requirements of 26 CFR 301.7602-2(c)(3)(i)(A) must be fulfilled as completed in order to make the case out to be more than a mere 26 CFR 301.6203-1 "case of tax shown on a return," so that Respondent(s) may not be restricted to the 6203-1 requirement to assess only "the amount so shown" (on the return).

Respondent(s) did not do more than simply make any summons of this matter to be in regard to nothing more than simply "the tax liability," which in and of itself designates nothing particular where the language of 26 CFR 301.7602-2(b)(3) requiring Respondent(s) to cause a summons sent to a third party to be made with respect to the determination of "the tax liability," does not provide for the mere quoting of part of the command's language, but requires that such "tax liability" as is referred to by use of the word "the" be actually named, described, or cited using the specifics named at 26 CFR 301.7602(c)(3)(i)(A). And, where even if a case could be made out that said complained of use of a command's language did designate something particular, it would still only constitute the fulfilling

of one requirement where 26 CFR 301.7602-2(c)(3)(i)(A) makes it clear, by use of the word "and," that two requirements must be met.

Where a summons to a third party does not both describe its proper purpose and also state the "particular tax liability" said proper purpose is being applied in regards to, then it lacks a needed nexus, and for failing to be "directly connected" to its purpose as 26 CFR 301.7602-2(c)(3)(i)(A) requires, and for having failed to comport with the *Powell* requirement to follow administrative steps required by the Code, it is a counterfeit document which cannot be legitimately enforced, and not a legitimate "third party contact."

To comply with said first requirement, a summons would have to contain language showing that it is made in regards to "the tax liability derived from" and then describe with certainty, at least one taxable activity by name and Code section.

To comply with said second requirement, a summons would have to contain language showing the taxpayer's liability to be summoned. That is to say that the case is more than a mere case of a tax shown on a return.

Congress left undisturbed the right of a person to have their speech accepted as being true and correct when certain limited conditions were met. Said certain limited conditions are that no showing of probable cause has been made which would serve as a legitimate basis for disturbing said speech, and that the maker of a return: is not in the class of taxpayers which renders returns of objects subject to

tax; has rendered a return prior to any time required by notice; has rendered a return completed as valid.

Petitioners rendered valid returns prior to any time required by notice, they are not in the class of taxpayers who render returns of objects subject to tax, their returns were valid and rendered prior to any time required by notice. Where said class and time criteria are met, absent a showing of probable cause, Respondent(s) lack *in personam* jurisdiction over Petitioners for any purpose requiring the serving of a summons.

This matter regards a "case of tax shown on a return by the taxpayer," 26 CFR 301.6203-1 therefore requires Respondent(s) to assess only "the amount so shown."

Any summons of this matter: is not "directly connected" to "the purpose of either determining or collecting a particular tax liability," as is required by 26 CFR 301.76-2(c)(3)(i)(A); is therefore, not "made with respect to the determination of the tax liability" of any Petitioner as is required by 26 CFR 301.7602-2(b)(3); consequently fails to make the case out to be anything different than a "case of tax shown on a return by the taxpayer" and fails to comport with the fourth *Powell* requirement.[9]

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[9] Text at page 31, fn 11.

Where a summons to a third party is made without being "directly connected to a particular tax liability" as is complained of, it is not "made with respect to the determination of the tax liability" as the regulations require, and has authority only as a data gathering device.

Data obtained via any as said complained of summons inherently exists not for any proper "determining or collecting" purpose, and any tax laid via a determination based on such data, which differs from Petitioners' determination already made, necessarily cannot be anything other than a tax laid without respect to any source derived from the voluntary participation in a federal benefit or privilege, on "what comes in," either in its entirety, or on any part, of otherwise undistinguished revenue, that is to say, a capitation[10] laid without

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[10] "The taxes which, it is intended, should fall indifferently upon every different species of revenue, are capitation taxes, ... Capitation taxes, if it is attempted to proportion them to the fortune or revenue of each contributor, become altogether arbitrary. The state of a man's fortune varies from day to day, and without an inquisition more intolerable than any tax, and renewed at least once every year, can only be guessed at. ... Capitation taxes, so far as they are levied upon the lower ranks of people, are direct taxes upon the wages of labour, and are attended with all the inconveniences of such taxes. ... In the capitation which has been levied in France without any interruption since the beginning of the present century, the highest order of people are rated according to their rank by an invariable tariff; the lower orders of people, according to what is supposed to be their fortune, by an assessment which varies from year to year." Adam Smith, *The Wealth Of Nations*

(Note 1: As Smith uses it, the word "wages" has the common-law meaning, not the custom-defined legal meaning of the term of the same spelling found in the modern revenue laws.)

apportionment, in violation of Article 1, Section 9, Clause 4, of the United States Constitution.

Prior to the issuance of any summons relative to this matter, Petitioners had presented evidence to Respondent(s) which described the conditions providing jurisdiction to issue a summons and showed that said conditions did not exist in regards to them. In issuing the complained of summonses to third parties, Respondent(s) therefore acted unreasonably and in bad faith.

ARGUMENT THAT BIVENS ACTION IS PROPER

Petitioners' alleged that Respondents caused a constitutional tort, which is exactly what *Bivens'* is designed to prevent.

> *Bivens'* purpose is to deter individual federal officers ... from committing constitutional violations. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, (2001)

Petitioners' futher alleged that said tort occurred while Respondent(s) were participating in unofficial conduct to which personal liability attached.

(Note 2: This Supreme Court recognized the authority of Smith in *Pacific Insurance Company v. Soule*, 74 U.S. 433 (1868), where it said, "Adam Smith, who was the great and universally received authority on political economy, in the day when the Federal Constitution was framed, sets forth a tax on a person's revenue to be a direct tax.")

Respondent(s) lack(s) immunity.

> ... absolute immunity for federal officials is justified only when "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens."
>
> *Westfall v. Erwin*, 484 U.S. 292, 295-296 (1988)

The existing administrative remedial scheme assumes a tax source exists which is other than a return and in this matter, where only a tax shown on a return exists, cannot provide an alternative remedy which is equally effective to a Bivens' action.

Bringing suit against the United States would render a significant part of Petitioners' issues and arguments to be moot.

Therefore Petitioners' Bivens action was properly taken and is sustainable.

ARGUMENT RE: FIRST AMENDMENT

Notwithstanding the fact that the tax returns of this matter were made on a government form, the speech or text placed thereon is the private property of those who created it or paid for its creation.

Petitioners have a property right in said speech. Absent that some particular liability has been shown to exist as to why their said speech (determination of tax) should not be accepted at face value. Within the limited conditions which are herein described, Petitioner's said speech cannot be replaced with another's different speech without violating the First Amendment's prohibition against abridging the freedom of speech.
As regards Petitioners, who render returns without undue delay which are not returns of objects subject to tax, a return is a negotiable instrument which cannot be refused on any substantially different basis than that which might be used to refuse a tender made in the United States Dollar ("USD") currency. In the case of the USD, the government created the speech (amount) thereon and created the debt it represents once it goes into circulation.

In making a valid and timely as said tax return not of objects subject to tax, the maker tenders a negotiable instrument and creates a potential private debt in the same way as the government creates the national debt. Absent that some particular liability of an annual filer is shown to exist which might give it jurisdiction to summon, Respondent(s) is(are) obligated to accept the return at face value (assess the amount shown on the return) in the same way people must accept the USD at its face value.

Where this case is not more than a case of a tax shown on a return, and Respondent(s) summoned information from third parties about any Petitioner, the effect was to negate or steal the property right Petitioners have in their returns by failing to accept them as the negotiable instruments they are. This may be able to be done where good and reasonable cause to do so has been shown, but Defendant(s) only seek(s) to do so based on mere good faith, nothing more than a claim that action was taken in compliance with the *Powell*[11] requirements, which cannot substitute for the actual showing that each said requirements were met. Respondent's said claim of good faith cannot in and of itself avail against any Petitioner's similar claim previously filed via their returns which were properly attested to under pains and penalties of perjury.

Any return Petitioners made is itself a showing of good faith.

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[11] "He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed."
U.S. v Powell, 379 U.S. 48, 57-58 (1964)

(What occurred is that the named Respondent substituted the showing of a verified claim that the *Powell* requirements had been complied with for the actual "showing" of the meeting of said requirements that *Powell* mandates.)

ARGUMENT RE:
LACK OF SUBJECT MATTER JURISDICTION

Respondent(s) lack third-party summons subject matter jurisdiction on the basis that: 26 CFR 301.7602-2(c)(3)(i)(A) restricts such subject matter to being only "a particular tax liability" "when directly connected to" the purpose of collecting same and Respondent(s) have not made any complained of summons directly connected to said purpose; 26 CFR 301.6203-1 requires that "[t]he amount of assessment shall, in the case of tax shown a return by the taxpayer, be the amount so shown," and where Respondents have not produced evidence that the case is other than a case of tax shown on a return by the taxpayer, no valid purpose exists for the issuance of a third-party summons.

ARGUMENT RE:
LACK OF IN PERSONAM JURISDICTION

Respondent(s) lack *in personam* jurisdiction over Petitioners for the purpose of issuing any summons regarding them, on the basis that the Statute which underlies the IRS's summons authority, RS 3173, impeaches the summons power where they each had rendered a valid return not of objects subject to tax prior to any time imposed by a notice to render a return.

ARGUMENT RE: FIFTH AMENDMENT

The Fifth Amendment protects a person's right to liberty.

The language of RS 3173 leaves one in the class of taxpayers who render timely as said valid returns not of objects subject to tax, at liberty to be left alone and not have data about them collected as long as no showing has been made that a probable cause exists as a basis for requiring something to be done other than assessing the amount shown on said return.

Said effect is demonstrated by language the code writers used to define what the law was prior to the creation of RS 3173, in § 93 of the Revenue Act of 1862, as is found emphasized *supra*, on page 9.

Early code language derived from RS 3173 continued said effect but streamlined its application by removing any need for a taxpayer to make a second return if a first one had been increased and focusing on describing when a revenue agent has jurisdiction to issue a summons. This can be seen *supra* on page 11, in the language of § 3615 of the 1939 Code, where at § 3615(b)(1) it is made clear that the liability which gives jurisdiction to a revenue agent whereby a summons may issue in regards to "any person," only arises when "on being notified or required" they "shall refuse of neglect to render such list or return within the time required."

Said § 3615, at §§ (b)(2), (3), and (4), makes it clear that the type of jurisdiction Respondent(s) seeks to exercise, the jurisdiction to issue a summons when a taxpayer has not first failed to render a return as required by notice, is limited to being applied only in regards to the class of taxpayers which render a "return of objects subject to tax." Which leaves the class of taxpayers Petitioners are in, the class which does not render returns of objects subject to tax, at liberty to timely as said, render a valid return and not thereby become subject to having a summons issue in regards to them.

As has been further described *supra* on page 12, where *LaSalle* is cited, and page 4 where *Bisceglia* is cited, as a showing that this honorable Supreme Court made it clear that today's IRC summons authority, 26 USC 7602, is derived in pertinent part from said § 3615 and as is relevant here, has no different meaning than what is expressed in said § 3615. Therefore, the liberty of a taxpayer which renders returns not of objects subject to tax, to not become a subject nor object of a summons when a timely as said valid return has been rendered, is the same today as it was in 1939.

Therefore, where Respondent(s) issued the complained of summonses, Petitioners' said right of liberty protected by the Fifth Amendment was violated.

ARGUMENT RE: RESPONDENT(S) APPLYING A CAPITATION WITHOUT APPORTIONMENT

Government agents rather prefer to exercise the government's power than to have their actions limited by regulation. Consequently they maximize what power statements say and minimize what limiting regulations say. Where, in the complained of summonses of this matter, the maker of same has only taken the words "the tax liability" from 26 CFR 301.7602-2(b)(3) and inserted them into any said summons as being sufficient for the purpose of causing the summons to be "made with respect to the determination or collection of the tax liability," without having followed 26 CFR 301.7602-2(c)(3)(i)(A) which defines something different than said words themselves as being what the summons must be made "with respect to," this is what Respondent(s) has(have) done.

> The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart is sufficient to satisfy us of the truth of this position.
>
> —George Washington, Farewell Address, 1796

As regards Petitioners who are people, where the complained of summonses of this matter lack the particularization herein described as being required by regulation, the information which is collected and handed over is more generalized in character than what can pass muster as being only relevant to an income tax. Said fact notwithstanding, where the

summons states on its face that it seeks information relevant to "the tax liability," it is viewed by the third party receiving it, as being so relevant, even though it is not so limited. The result is that the tax which ends up being laid is laid upon all revenue without regard to whether or not the source of the revenue is one of the certain activities or privileges which produce taxable income,[12] and is therefore a capitation laid without apportionment in violation of Article 1, Section 9, Clause 4, of the constitution of the United States.

ARGUMENT RE: CORPORATION APPEARING WITHOUT LICENSED COUNSEL.

Where jurisdiction has been challenged, as it has in this matter below, and where not allowing a corporation to appear would allow Respondent(s) to go where Congress has constrained her(them) from going, the below courts lacked the jurisdiction to dismiss corporate Petitioner from this case, without first finding Respondent's(s') jurisdiction to summon, which is necessarily also the court's jurisdiction to enforce, and/or in the interest of justice, must necessarily allow a corporation to appear without

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[12] The income tax is, therefore, not a tax on income as such. It is an excise tax with respect to certain activities and privileges which is measured by reference to the income which they produce. The income is not the subject of the tax: it is the basis for determining the amount of tax.

F. Morse Hubbard, Treasury Department legislative draftsman. House Congressional Record, March 27th 1943, page 2580

See also: *Brushaber v. Union Rail Co.*, 240 U.S. 1 (1916); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 151 (1911); *Stratton's Independence, LTD v. Howbert*, 231 U.S. 399 (1913); *Eisner v. Macomber*, 252 U.S. 189 (1920); and *Merchant's Loan & Trust Co. v. Smietanka*, 255 U.S. 509 (1921)

licensed counsel when that is the only way it can afford to make an appearance.

Where this case is about jurisdiction and the corporate Petitioner is not allowed to appear without being represented by licensed counsel, which is the only way it can possibly do so, then the situation which exists is inequitable and warrants a remedy applied via the doctrine of equitable estoppel. This because, in the first place, no money exists sufficient to hire an attorney, and in the second place only allowing the corporate Petitioner to appear in the court by attorney fetter's the court's ability to do justice between the other parties in this case, where the exercise of the jurisdiction complained of is restricted to the class of taxpayers the corporate Petitioner is not found in. The inequity exists because, all else being equal, where it could be possible for the natural Petitioners to obtain legal relief while at the same time that the corporate Petitioner could not, as regards the corporate person, Respondent(s) would be allowed to proceed where the relevant Statute does not provide the jurisdiction needed to legally do so.

ARGUMENT THAT DISTRICT COURT MADE CLEAR ERROR

In its Order Dated 26 June 2007 (Doc 39) the District Court said:

> Assertions by affidavit of the investigating agent that the requirements are satisfied are sufficient to make the prima facie case. Saunders, 951 F.2d at 1067.

Petitioners agree with that statement. The Court however then goes on to say:

> Here, the sworn declaration of Paula Henderson satisfies the government's "minimal" burden of showing that the summons was issued for a proper purpose.

Said second statement, converts the IRS's statutory authority to seek enforcement, into a completely autonomous authority requiring enforcement without further judicial oversight, and is therefore clear error.

What *Saunders* actually says at 1067, is that, where the required minimal showing had been made, "[t]he IRS had the authority both to issue and seek enforcement of the Saunder's summons."[13]

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[13] Where it appears the Saunder's summons was issued based on a failure to file a return, Petitioners agree with the *Saunders* case completely while at the same time noting that where they did file returns, it is inapposite as applied to them.

ARGUMENT THAT COURT OF APPEALS ERRED

For reasons as follow, the cases the below appellate court relies on are inapposite to Petitioners' appeal and not proper support for its dismissal.

Stewart states the prima facie case therein prevailed because "[o]n appeal, Morse (Stewart) offers no evidence in rebuttal to the government's prima facie case that the summons was issued in good faith." Petitioners however, on appeal, did offer evidence in rebuttal to the below prima facie case that the summonses were issued in good faith.

Petitioners alleged Respondent(s) were not conducting tax assessments and collections where she(they) had no duty and under existing conditions described, lacked a jurisdiction to issue a summons, and offered evidence in support thereof. No evidence that either any as said duty or jurisdiction existed was ever offered. Where the below appellate court states that *Adams v. Johnson* holds only "that *Bivens* relief is unavailable against IRS auditors for conducting tax assessments and collections," it does not hold anything which can support the dismissal of Petitioners' case which is a case against Respondent(s) where she(they) is(are) not conducting assessments and collections.

Where the below appellate court relies on *Gilbert v. Da Grossa*, and states that it holds only that "a suit against an IRS employee for actions taking (sic) in his official capacity is a suit against the United States," where Petitioners' suit was taken against Respondent(s) in her(their) private capacity and not

for any action taken in an official capacity, said case is inapposite to Petitioners' case.

Petitioners' challenged the IRS agent's jurisdiction to summon under existing conditions described and said jurisdiction has not been found. This being the situation, where dismissing a Petitioner's case for being a corporation appearing pro se would enforce a summons issued without jurisdiction, a court lacks jurisdiction to dismiss such a party's appeal where the dismissal necessarily exercises a jurisdiction alleged to not exist that has not been found.

REASONS THIS PETITION SHOULD BE GRANTED

The below District Court so far departed from the accepted and usual course of judicial proceedings which in the interest of justice: where a claim that the IRS lacked, on a basis of taxpayer class, a jurisdiction to issue a summons, and on said same basis the court itself lacked an enforcement jurisdiction, the court must address the jurisdictional challenges laid and not ignore them as it did; where a claim that regulations had not been followed, the court necessarily should have laid Petitioners' description showing how regulations had not been followed, alongside the regulations themselves, and make a decision only via that directly comparative procedure instead of relying solely as it did, on Respondent(s) mere prima facie claim of having acted in good faith.

The below appellate court has sanctioned said departure.

Where: the United States Court of Appeals for the Fifth Circuit, in *U.S.A. v. Humble Oil & Refining Co.*, 488 F.2d 953, stated that if the IRS is allowed to proceed as if "an unrestricted license" exists in regard to the issuance of summonses to third parties, the resultant situation would "eviscerate judicial constraints upon the summons power and raise serious constitutional questions, and; this court, in *United States v. Bisceglia*, 420 U.S. 141, 151 (1975), stated that where the proper bounds of the summons power are exceeded, "a jurisdictional question is presented which is cognizable in the courts," and; Petitioners in their below Petition To Quash claimed and showed that a lack of jurisdiction existed because the summons power was being used extra statutorily outside its proper bounds, and claimed and showed resultant constitutional violations; then, the below Court of Appeals for the Ninth Circuit has entered a decision in conflict with the just above said decision of the Court of Appeals for the Fifth Circuit on the same important matter of the proper bounds of the summons power, and where both the below Courts have completely failed to take cognizance of the jurisdictional issue Petitioners raised, they are in conflict with this honorable Supreme Court's decision in *Bisceglia*.

Said departure and conflicts are severe enough to call for this Court to exercise its supervisory power.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

Respectfully submitted.

Terry F. Zdun
Carol J. Zdun
Terry F. Zdun, President, Dentex P.C.

It might be demonstrated that the most productive system of finance will always be the least burdensome.

—Alexander Hamilton, Federalist No. 35

APPENDIX

FILED'06 NOV 07 11:29USDC-ORE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TERRY Z. DUNN (sic), et al,
Plaintiffs, Civil No. 06-6072-TC
v. ORDER
PAULA HENDERSON, et al.,
Defendants.

COFFIN, Magistrate Judge.

On March 31, 2006, plaintiff filed a "Petition to Quash Summons" against defendant Internal Revenue Agent Paula Henderson and two Doe defendants "as individuals." On July 28, 2006, plaintiff filed an amended petition, a "demand for bill of particulars, request for injunction and claim for personal damages." (#3)

On October 2, 2006, the United States, as real party in interest, filed a Motion to Dismiss Complaint and/or for Summary Denial of Relief (#4).

Plaintiff has not responded to defendant's motion or requested an extension of time in which to do so. Accordingly, plaintiff is allowed 30 days from the date of this order to show cause in writing why defendant's unopposed motion (#4) should not be

allowed. Plaintiff is advised that failure to show cause as ordered by the court will result in the dismissal of this action for failure to prosecute.

The Clerk of the Court is requested to re-set defendants' motion for the court's consideration after the expiration of 30 days.

IT IS SO ORDERED

DATED this 7 day of November, 2006.

(Signed in original.)
Thomas N. Coffin
United States Magistrate Judge

2 – ORDER

(Document 11)

Scheduling Orders/Judgments/Other Orders
6:06-cv-06072-TC Zdun et al v. Henderson

U.S. District Court
District of Oregon

Notice of Electronic Filing

The following transaction was entered on 12/18/2006 at 9:15 AM PST and filed on 12/18/2006
Case Name: Zdun et al v. Henderson
Case Number: 6:06-cv-6072
Filer:
Document Number: 14(No document attached)

Docket Text:
Order Striking findings and recommendations [#13] based upon plaintiff's response to the court's order to show cause, which is construed as a response to defendant's motion to dismiss. Ordered motion to dismiss is taken under advisement on 1/2/07. Ordered by Judge Thomas M. Coffin. (cw)

6:06-cv-6072 Notice has been electronically mailed to:

James Edward Weaver james.e.weaver@usdoj.gov, western,taxcivil@usdoj.gov

6:06-cv-6072 Notice will not be electronically mailed to:

Dentex, P.C.
600 Devils Knob Road
Tiller, OR 97484

Carol Zdun
600 Devils Knob Road
Tiller, OR 97484

Terry F. Zdun
600 Devils Knob Road
Tiller, OR 97484

FILED '07 JAN 29 12:04 USDC-ORE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TERRY F. ZDUN, et al.,
Plaintiffs, Civil No. 06-6072-TC
v. FINDINGS AND
PAULA HENDERSON, et al., RECOMMENDATION
Defendants.

COFFIN, Magistrate Judge.

On March 31, 2006, plaintiffs filed a "Petition to Quash Summons" against defendant Internal Revenue Agent Paula Henderson and two Doe defendants "as individual." On July 28, 2006, plaintiffs filed an amended petition, a "demand for bill of particulars, request for injunction and claim for personal damages." (#3)

On October 2, 2006, the United States, as real party in interest, filed a Motion to Dismiss Complaint and/or for Summary Denial of Relief (#4).

Plaintiffs did not file a response to request an extension of time in which to do so, and by Order (#11) entered November 7, 2006, plaintiffs were allowed 30 days to show cause in writing why the unopposed motion (#4) should not be allowed. Plaintiffs were advised that failure to show cause as ordered by the court would result in the dismissal of this action for failure to prosecute.

Plaintiffs did not respond to the court's order to show cause within 30 days or request an extension of time in which to respond. Therefore, a Findings and Recommendation (#13) was entered on December 12, 2006, recommending that pursuant to

the court's Order (#11) this action should be dismissed for failure to prosecute.

On December 12, 2006, plaintiffs filed a "Showing of Cause why Defendants' Unopposed Motion Should Not be Allowed (#12). In an abundance of deference to plaintiff's pro se status, the Findings and Recommendation (#13) was withdrawn in order for the court to consider plaintiffs' arguments. However, nothing in plaintiffs' brief changes the court's findings and conclusion set forth in the Findings and Recommendation (#13).

United States' Motion to Dismiss (#4) and exhibits thereto establish that the United States is the proper party-defendant. Plaintiffs' arguments that Revenue Agent Henderson is not an employee of the United States because the "IRS is not an agency of the United States," and that the Internal Revenue Code is not "positive law" are frivolous.

Plaintiffs' petition/complaint to quash IRS summonses directed to Revenue Agent Henderson should be denied.[1]

The United States' motion and exhibits establish that plaintiffs' other claims and requests for relief should be denied for lack of subject matter jurisdiction and failure to state a claim.

Accordingly, the Motion to Dismiss (#4) should be allowed and this action should be dismissed with prejudice.

---

[1]Plaintiffs filed a similar petition with respect to summonses issued in connection with their 2001-2002 tax years. See, Civ. No. 6:05-CV-6210-HO. By Order (#20) entered March 23, 2006, the court held that plaintiffs had no personal recourse against Ms. Henderson and dismissed plaintiffs' petition(s) for lack of jurisdiction.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. An notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections. Failure to timely file objection to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issue and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judges's (sic) recommendation.

DATED this 29 day of January, 2007

(Signed in original.)
Thomas M. Coffin
United States Magistrate Judge

(Document 17.)

Scheduling Orders/Judgments/Other Orders
6:06-cv-06072-TC Zdun et al v. Henderson

U.S. District Court
District of Oregon

Notice of Electronic Filing

The following transaction was entered on 2/8/2007 at 3:09 PM PST and filed on 2/8/2007
Case Name: Zdun et al v. Henderson
Case Number: 6:06-cv-6072
Filer:
Document Number: 19(No document attached)

Docket Text:
ORDER: Granting Motion for Extension of Time [18]: Plaintiff is allowed until 2/28/07, to file objections to the court's findings and recommendations. Ordered by Judge Thomas M. Coffin. (cw)

6:06-cv-6072 Notice has been electronically mailed to:

James Edward Weaver james.e.weaver@usdoj.gov, western,taxcivil@usdoj.gov

6:06-cv-6072 Notice will not be electronically mailed to:

Dentex, P.C.
600 Devils Knob Road
Tiller, OR 97484

Carol Zdun
600 Devils Knob Road
Tiller, OR 97484

Terry F. Zdun
600 Devils Knob Road
Tiller, OR 97484

(*Document 19*)

FILED 07 MAR 19 11:04 USDC-ORE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TERRY ZDUN, et al.,
Plaintiffs,
v.
PAULA HENDERSON, et al.,
Defendants.

Civil No. 06-6072-TC
ORDER

COFFIN, Magistrate Judge.

Plaintiffs' Motion for reconsideration (#20) is denied. The clerk of the court is directed to refer plaintiffs' objections [contained in plaintiffs' motion/document (#20)] to a District judge in the normal course.

Plaintiffs' "Motion for Order re timeliness" (#21) is allowed to the extent that plaintiffs' objections are deemed timely filed and denied in all other respects.

IT IS SO ORDERED.

DATED this 19 day of March, 2006

(Signed in original.)
Thomas M. Coffin
United States Magistrate Judge

Document 24

Scheduling Orders/Judgments/Other Orders
6:06-cv-06072-TC Zdun et al v. Henderson

U.S. District Court
District of Oregon

Notice of Electronic Filing

The following transaction was entered on 3/20/2007 at 11:06 AM PDT and filed on 3/20/2007
Case Name: Zdun et al. v. Henderson
Case Number: 6:06-cv-6072
Filer:
Document Number: 25(No document attached)

Docket Text:
Order referring Findings & Recommendation: Motion to Dismiss *Complaint and/or For Summary Denial of Relief Sought by Plaintiffs, filed by United States, the real-party defendant in this case*[4] should be granted to Judge Ann Aiken for review. Ordered by Judge Thomas M. Coffin. (cw)

6:06-cv-6072 Notice has been electronically mailed to: James Edward Weaver james.e.weaver@usdoj, western.taxcivil@usdoj.gov

6:06-cv-6072 Notice will not be electronically mailed to:

Dentex, P.C.
600 Devils Knob Road
Tiller, OR 97484

Carol Zdun
600 Devils Knob Road
Tiller, OR 97484

Terry F. Zdun
600 Devils Knob Road
Tiller, OR 97484

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TERRY F. ZDUN, et al., Plaintiffs, v. PAULA HENDERSON, et al., Defendants.	Civil No. 06-6072-TC O R D E R

Magistrate Judge Coffin filed his Findings and Recommendation on January 29, 2007. The matter is now before me. See 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). No objections have been timely filed. This relieves me of my obligation to give the factual findings de novo review. Lorin Corp. v. Goto & Co., Ltd., 700 F.2d 1202, 1206 (9th Cir. 1982). See also Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983). Having reviewed the legal principles de novo, I find no error.

THEREFORE, IT IS HEREBY ORDERED that, I adopt Judge Coffin's Findings and Recommendation.

Dated this 21 day of March, 2007.

(Original signed by)
Ann Aiken, United States District Judge

Document 26

FILED 07 MAR 21 16:36 USDC-ORE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TERRY F. ZDUN, et al,
Plaintiffs,

v. **Civil No. 06-6072-TC**

PAULA HENDERSON, et al,
Defendants.

JUDGMENT

This action is dismissed.

Dated: March 21, 2007

SHERYL S. McCONNELL, CLERK
by (signed in original)
L. Brinn, Deputy

JUDGMENT

(Document 27)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TERRY F. ZDUN, CAROL J. ZDUN, and DENTEX PC,
Plaintiffs,

v.

PAULA HENDERSON, REVENUE AGENT, AND DOES 1-10, et al, as individuals,
Defendants.

Civ. No. 06-6072-TC

ORDER

Aiken, Judge:

On January 29, 2007, Magistrate Judge Coffin issued his Findings and Recommendation in the above-captioned action and recommended that Motion to Dismiss and for Summary Denial of Relief be granted. On March 21, 2007 I adopted the Findings and Recommendation without de novo review of the factual findings. However plaintiffs are correct that they filed timely objections, and plaintiff's Motion to Alter or Amend Judgment (Doc. 29) is GRANTED to the extent I consider their objections. See 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b).

When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the magistrate judge's report. See 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309,

1313 (9th Cir. 1981). I have therefore, given de novo review of Judge Coffin's opinion, and I find no error.

The IRS may issue a summons for production of information relevant to "determining the liability of any person for internal revenue tax." 26 U.S.C. § 7602(a). To establish a prima facie case for enforcement of a summons, the government must show that: 1) the summons was for a legitimate purpose; 2) the material being sought was relevant to the investigation; 3) the information was not already in the IRS's possession; and 4) satisfies all administrative steps for Internal Revenue Code. See United States v. Powell, 379 U.S. 48 57-58 (1964); United States v. Saunders, 951 F.2d 1065, 1067 (9th Cir. 1991). Assertions by affidavit of the investigating agent that the requirements are satisfied are sufficient to make the prima facie case. Saunders, 951 F.2d at 1067.

Here, the sworn declaration of Paula Henderson satisfies the government's "minimal" burden of showing that the summons was issued for a proper purpose. See id. Further, there is no requirement that the IRS make an assessment or show that defendants (sic) have a tax liability before issuing a summons, because the IRS may issue a summons to investigate possible tax liability. See 26 U.S.C. § 7602; Saunders, 951 F.2d. at 1067. Finally, I agree with Magistrate Judge Coffin that defendant Henderson is not the proper party-defendant in this case, and that plaintiff fails to establish subject matter jurisdiction or to state a

claim for which relief may be granted. See Memorandum in Support of Motion to Dismiss; 26 U.S.C. § 7609(c)(2)(A).

THEREFORE, IT IS ORDERED that Magistrate Judge Coffin's Findings and Recommendation (doc. 17) filed January 29, 2007 is ADOPTED. Defendant's Motion to Dismiss (doc. 4) is GRANTED and plaintiff's claims are DISMISSED. All pending motions are DENIED as MOOT. IT IS SO ORDRED.

Dated this 26 day of June, 2007.

(Original signed by) Ann Aiken
United States District Judge

(Document No. 39)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TERRY F. ZDUN,
CAROL J. ZDUN, and
DENTEX PC,

Plaintiffs'

v. **Civil No. 06-6072-TC**

PAULA HENDERSON, REVENUE AGENT,
AND DOES 1-10, et al, as individuals,

Defendants.

JUDGMENT

This action is dismissed.

Dated: June 27, 2007

SHERYL MC CONNELL, CLERK
by (*signed in original*)
Leslie Engdall, Deputy

JUDGMENT **DOCUMENT NO:** 40

Orders/Record of Orders on Motions
6:06-cv-06072-TC Zdun et al v. Henderson
CASE CLOSED on 03/21/2007

U.S. District Court
District of Oregon

Notice of Electronic Filing

The following transaction was entered on 7/2/2007 at 2:09 PM PDT and filed on 7/2/2007
Case Name: Zdun et al v. Henderson
Case Number: 6:06-cv-6072
Filer:
WARNING: CASE CLOSED no 03/21/2007
Document Number: 42(No document attached)

Docket Text:
ORDER: Defendant's Motion to Strike [35] is denied as moot given the court's order adopting the Findings and Recommendation and dismissing the case. Ordered by Judge Ann L. Aiken (lae)

6:06-cv-6072 Notice has been electronically mailed to:

James Edward Weaver james.e.weaver@usdoj.gov, western.taxcivil@usdoj.gov

6:06-cv-6072 Notice will not be electronically mailed to:

Dentex, P.C.
600 Devils Knob Road
Tiller, OR 97484

Carol Zdun
600 Devils Knob Road
Tiller, OR 97484

Terry F. Zdun
600 Devils Knob Road
Tiller, OR 97484

(*Document 42*)

Orders/Record of Orders on Motions
6:06-cv-06072-TC Zdun et al v. Henderson
CASE CLOSED on 03/21/2007

U.S. District Court
District of Oregon

Notice of Electronic Filing

The following transaction was entered on 7/23/2007 at 10:19 AM PDT and filed on 7/23/2007
Case Name: Zdun et al v. Henderson
Case Number: 6:06-cv-6072
Filer:
WARNING: CASE CLOSED no 03/21/2007
Document Number: 47(No document attached)

Docket Text:
ORDER: Denying Plaintiff's Motion to Alter or Amend Judgment Dated 26 June 2007 [44]. Ordered by Judge Ann L. Aiken (lae)

6:06-cv-6072 Notice has been electronically mailed to:

James Edward Weaver james.e.weaver@usdoj.gov, western,taxcivil@usdoj.gov

6:06-cv-6072 Notice will not be electronically mailed to:

Dentex, P.C.
600 Devils Knob Road
Tiller, OR 97484

Carol Zdun
600 Devils Knob Road
Tiller, OR 97484

Terry F. Zdun
600 Devils Knob Road
Tiller, OR 97484

(*Document 47*)

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 15 2009

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TERRY F. ZDUN; et al.,

Plaintiffs – Appellants,

v.

PAULA HENDERSON, Revenue Agent,

Defendant – Appellee.

No. 07-35465

D.C. No. CV-06-06072-TMC

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann Aiken, District Judge, Presiding
Submitted December 17, 2008**
Before: WALLACE, TROTT, and RYMER, Circuit Judges.

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Terry Zdun, Carol Zdun, and Dentex, P.C., appeal pro se from the district court's judgment dismissing their petition to quash summonses issued by Internal Revenue Service ("IRS") revenue agent Paula Henderson. We have jurisdiction under 28 U.S.C. § 1291. We review for clear error. *United States v. Blackman*, 72 F.3d 1418, 1422 (9th Cir. 1995). We affirm in part and dismiss in part.

The district court properly dismissed the action based on the government's prima facie showing that the summonses were issued in good faith. *See Stewart v. United States*, 511 F.3d 1251, 1254 (9th Cir. 2008) (describing requirements for enforcing summons (sic) and concluding that the government met its burden by introducing a sworn declaration from the revenue agent who issued the summons). Further, the district court correctly determined that IRS agent is not a proper defendant. *See Adams v. Johnson*, 355 F.3d 1179, 1185-86 (9th Cir. 2004) (holding that *Bivens* relief is unavailable against IRS auditors for conducting tax assessments and collections); *Gilbert v. Da Grossa*, 756 F.2d 1455, 1458 (9th Cir. 1985) (stating that a suit against an IRS employee for actions taking (sic) in his official capacity is a suit against the United States).

This appeal by Dentex, P.C., is dismissed because a corporation may not appear pro se. *See Rowand v. California Men's Colony*, 506 U.S. 194, 201-02 (1993) "It has been the law for the better part of two centuries ... that a corporation may appear in the federal courts only through licensed counsel.")

Appellants' remaining contentions are unpersuasive.

AFFIRMED in part; DISMISSED in part.

CONSTITUTIONAL PROVISIONS

Article 1, Section 9, Clause 4

> No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

First Amendment

> **Congress shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; **or the right of the people** peaceably to assemble, and **to petition the government for a redress of grievances**.

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and **no warrants shall issue, but upon probable cause**, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor **be deprived of** life, **liberty, or property**, **without due process of law**; nor shall private property be taken for public use, without just compensation.

STATUTES[15]

Revised Statutes of 1873 (amended 1919), § 3173 ("RS 3173")

> ... And if any person, on being notified or required as aforesaid, (*of an obligation to render a return*) shall refuse or neglect to render such list or return within the time required as aforesaid (*ten days*), or whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or delivers any return which, in the opinion of the collector, is erroneous, false or fraudulent, or contains any undervaluation or understatement, or refuses to allow any regularly authorized Government officer to examine the books of such person, firm, or corporation, it shall be lawful for the collector to summon such person.

REGULATIONS

26 CFR 301.6203-1

The amount of assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, ...

---

[15] The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction, and such deference is particularly appropriate where an agency's interpretation involves issues of considerable public controversy and Congress has not acted to correct any misperception of its statutory objectives. *CBS, INC. v. FCC*, 453 U.S. 367 (1981)

REGULATIONS (continued)

26 CFR 301.7602-1(a)

> For the purpose of ... determining ***the*** liability of any person for any internal revenue tax ... the Internal Revenue Service may examine ... (certain named stuff) **which may be relevant or material** to such inquiry.

26 CFR 301.7602-2

> (b) *Third-party contact defined.* Contacts subject to section 7602(c) and this regulation shall be called "third-party contacts." A third-party contact is a communication which—
>
> (1) Is initiated by an IRS employee;
>
> (2) Is made to a person other than the taxpayer;
>
> (3) **Is made with respect to the determination of *the* tax liability** of such taxpayer; [16]
>
> (4) Discloses the identity of the taxpayer being investigated; and

---

[16] Tax liability is a condition precedent to the demand. Merely demanding payment, even repeatedly, does not cause liability. For the condition precedent of liability to be met, there must be a lawful assessment, either a voluntary one by the taxpayer or one procedurally proper by the IRS. Because this country's income tax system is based on voluntary self-assessment, rather than distraint, *Flora v. United States*, 362 U.S. 145, 176, 80 S.Ct. 630, 646-7, 4 L.Ed.2d 623 (1960), the Service may assess the tax only in certain circumstances and in conformity with proper procedures.

Bothke v. Terry, 713 F. 2d 1405, 1414 (1983)

(5) Discloses the association of the IRS employee with the IRS.

26 CFR 301.7602-2(c)(3)(i)

(A) A contact is "with respect to" the determination or collection of the tax liability of such taxpayer when made for the purpose of either determining or collecting a particular tax liability and **when directly connected to that purpose**.

(B) *Determination or collection.* A contact is with respect to the "determination or collection" of the tax liability of such taxpayer when made during the administrative determination or collection process. ....

(C) *Tax liability.* A *tax liability* means the liability for any tax imposed by Title 26 of the United States Code (including any interest, additional amount, addition to the tax, or penalty) and does not include the liability for any tax imposed by any other jurisdiction nor any liability imposed by other Federal statutes. ....

(D) *Such taxpayer.* A contact is with respect to the determination or collection of the tax liability of "such taxpayer" when made while determining or collecting the tax liability of a particular, identified taxpayer. ....

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4

(i) SERVING THE UNITED STATES AND ITS AGENCIES, CORPORATIONS, OFFICERS, OR EMPLOYEES

...

(3) *Officer or Employee Sued Individually.* To serve a United States officer or employee sued in an individual capacity for an **act or omission occurring in connection with duties** performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

Rule 52.

(a) FINDINGS AND CONCLUSIONS.

(1) *In General.* In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58

Rule 54.

(b) JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.